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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 608

RICHARD A. KENT, CLAIMANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals affirming the judgment of the district court (R. 149–151) and its opinion denying a petition for rehearing (R. 155–156) are reported at 157 F. 2d 1. The opinion of the district court and its findings of fact and conclusions of law appear at pages 132–140 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered July 26, 1946 (R. 151), and a petition for rehearing (R. 152–154) was denied August

28, 1946 (R. 156). The petition for a writ of certiorari was filed October 12, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 12, 1925.

QUESTION PRESENTED

In a proceeding for the forfeiture of property alleged to have been possessed by petitioner with intent to use it in violating certain provisions of the internal revenue laws relating to liquor, the district judge stated in his opinion adjudging the forfeiture of the property that in the light of the substantial evidence adduced by the Government establishing such intent on the part of petitioner, he was not willing to ignore petitioner's failure to testify on this issue. The question is whether this was violative of the constitutional privilege against self-incrimination or of the statute (28 U. S. C. 632) providing that in the trial of a person charged with the commission of a crime, his failure to testify shall not create any presumption against him.

STATUTES INVOLVED

Section 3116 of the Internal Revenue Code (26 U. S. C. 3116) provides:

> It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations pre-

scribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of the act of June 15, 1917, 40 Stat. 228 (U. S. C., Title 18, §§ 611–633), for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or property under the provisions of this part, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws.

The Act of March 16, 1878, c. 37, 20 Stat. 30 (28 U. S. C. 632), provides:

In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And

his failure to make such request shall not create any presumption against him.

STATEMENT

This proceeding arose upon a libel, as amended,[1] filed in the District Court for the Eastern District of Louisiana to adjudicate the forfeiture of a truck and certain liquor. The libel alleged that petitioner had been in possession of this property with intent to use it in the business of a wholesale liquor dealer although he was not registered as such with the Collector of Internal Revenue (R. 21–24), and that, therefore, the property was subject to forfeiture under Section 3116 of the Internal Revenue Code, *supra*.[2]

Petitioner does not question the sufficiency of the evidence to support the decree of condemnation and forfeiture. That decree (R. 140–141)

[1] The original libel was filed August 24, 1944 (R. 2–8), and it was amended on November 6, 1944 (R. 15–17), December 18, 1944 (R. 20–24), and May 5, 1945 (R. 24–25).

[2] Count 1 of the libel also claimed forfeiture under Section 3253 of the Internal Revenue Code (26 U. S. C. 3253) predicated on the actual commission of offenses under the internal revenue laws, i. e., having engaged in the wholesale liquor business without a license (R. 5). However, at the trial and in all subsequent proceedings, the parties and the courts below proceeded on the theory, followed in the petition here, that the only issue raised by the evidence adduced related to the intended use of the property in violation of the internal revenue laws, and the issue whether actual violations had been committed was excluded. See, e. g., R. 133, 149–150, 153, 155–156, and Pet. 2, 3, 5–6.

was predicated on the findings of the trial court that although petitioner had qualified as a retail liquor dealer at a place known as "The Spot" in East Jackson, Mississippi, for the period July 1, 1943, to June 30, 1944, but not thereafter, he had not qualified as such at any other place; that he had not qualified as a wholesale liquor dealer anywhere in Louisiana or Mississippi; and that at the time of the seizure of the truck and liquor by agents of the Alcohol Tax Unit on June 2, 1944, petitioner "intended to sell the liquor to anyone in Jackson, wholesale or retail, whichever way he could get the most money for it" (R. 138–139).[3] The court therefore concluded as a matter of law that the property was intended for use in violating specified provisions of the internal revenue laws and, consequently, was subject to seizure and forfeiture (R. 139–140). In his opinion (R. 132–138) filed concurrently with his findings of fact and conclusions of law, the trial judge, after summarizing the evidence adduced by the Government establishing petitioner's intent to violate the law, made the following statement which gave rise to the issue mooted in the court below and here (R. 136–137):

[3] The opinion of the District Court also refers to evidence showing that petitioner had made wholesale sales and that he could not have disposed of the seized liquor at "The Spot," for which he had a retail license, since others were operating those premises (R. 132–135).

> Finally, it will be remembered that the seizing officers testified that Kent told them he intended to sell the liquor to anyone in Jackson, wholesale or retail, whichever way he could get the most money for it.
>
> But were the statements attributed to Kent by the three officers untrue, or were the inferences drawn from his previous illegal sales unwarranted, one man and one man alone is in the best position to make the necessary denials. That man is Kent himself. He best of all knows what he told the officers. He more than any other human being in the world knows what plans for the disposition of the liquor he was harboring on June 2, 1944, when the liquor was seized. Yet Kent has seen fit to remain silent throughout these proceedings, although he has intimate knowledge regarding the controverted issue of *intent*. The Court is not willing to ignore this significant silence.

On appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 149–151), and a petition for rehearing, based solely on the same contentions as are presented in the petition for a writ of certiorari, was denied (R. 155–156).

ARGUMENT

The sole issue here involves the propriety of the trial judge's attitude in considering, to the extent indicated in his opinion, the fact that petitioner remained silent on the controverted issue of his

intent. There can be no doubt that if the libel proceeding was a civil proceeding, the trial judge was entitled to give consideration to petitioner's silence. *Lilienthal's Tobacco* v. *United States,* 97 U. S. 237, 263–268. Petitioner urges, however, principally on the authority of *Boyd* v. *United States,* 116 U. S. 616, that the proceeding is criminal in nature, and that, therefore, the protections of the Fifth Amendment against self-incrimination and of the Act of March 16, 1878, 28 U. S. C. 632, proscribing the creation of a presumption against a silent defendant, were applicable and were abridged by the trial judge (Pet. 6–12).

In order properly to evaluate the foregoing contentions, it is necessary to analyze the terms of Section 3116 of the Internal Revenue Code, *supra,* pp. 2–3, under which the forfeiture was had. That section, in the first sentence, provides for forfeiture in two distinct classes of cases: (1) where the property is intended to be used unlawfully, and (2) where it has already been so used. In either case, since the statute provides that "no property rights shall exist in any such liquor or property," it is clear that the forfeiture is automatic upon the existence of the circumstances described. Cf. *United States* v. *Grundy and Thornburgh,* 3 Cranch 337. The forfeiture under the first branch of the statute, upon which the libel here proceeded, is designed to prevent the execution of intended unlawful activities, rather than to punish on account

of the past commission of offenses. In this respect, this part of the statute is in direct contrast with forfeiture provisions such as Section 3253 of the Internal Revenue Code, whereby the forfeiture results from accomplished unlawful activity.[4] The forfeiture here is thus not punitive but preventive and is calculated to enable the Government to seize the intended implements of crime before the unlawful and punishable activity occurs.[5] In short, while many property forfei-

[4] That section (26 U. S. C. 3253) provides as follows:

"Any person who shall carry on the business of a brewer, rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills, and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States." Cf. also, e. g., Crim. Code, Section 308 (18 U. S. C. 499); Act of August 9, 1939, c. 618, § 2, 53 Stat. 1291 (49 U. S. C. 782); Act of June 6, 1924, c. 272, § 6, 43 Stat. 466 (48 U. S. C. 226); Act of July 2, 1890, c. 647, § 6, 26 Stat. 210 (15 U. S. C. 6); Act of June 17, 1930, c. 497, Tit. IV, § 460, 46 Stat. 717, as amended (19 U. S. C. 1460).

[5] Cf. Section 172 of the Criminal Code (18 U. S. C. 286), providing, *inter alia*, for forfeiture of material or apparatus "fitted or intended to be used" in the making of counterfeit government obligations.

tures are worked partially if not completely as a form of punishment in consequence of the use of such property in the execution of criminal acts, in some instances Congress has apparently felt that it is necessary and desirable, in order to prevent the commission of certain types of offenses, to allow the seizure and condemnation of criminally usable property even before an offense occurs and thereby avoid the injurious consequences of an actual violation.[6] Such a forfeiture, while it may work a loss upon the owners, cannot be said to be punitive, or a substitute for other punishment consequent upon actual criminal activity.

In the light of the foregoing analysis of the forfeiture contemplated by the first part of Section 3116, it is clear that petitioner's contentions are without merit. The libel here was purely civil in all its aspects, not punitive or quasi-criminal, and therefore the privilege against self-incrimination and the corollary statutory privilege against the creation of a presumption from silence were not offended. The statute was enacted to relieve a defendant in a criminal case,

[6] Section 3116 of the Internal Revenue Code is derived from the Act of August 27, 1935, § 8, 49 Stat. 872, 874, the "Liquor Law Repeal and Enforcement Act." The Senate Report on that Act stated, with respect to this provision, that "this extension bridges a gap now existing in the internal-revenue laws and in title III [now Chapter 26, Subchapter C, Part II, I, R. C.] with regard to the seizure of property intended for use in violating the designated laws." (S. Rep. 1330, 74th Cong., 1st sess., p. 3.)

at his election, from his common-law disability as a witness. *Bruno* v. *United States,* 308 U. S. 287, 292; *Wilson* v. *United States,* 149 U. S. 60, 65–66. Having thus made a defendant competent to testify, as a corollary it was appropriate, so as not to infringe upon the constitutional privilege against self-incrimination, to prohibit the creation of any presumption against him by reason of his desire to remain silent. See *Tomlinson* v. *United States,* 93 F. 2d 652, 656 (App. D. C.), certiorari denied, *sub nom. Pratt* v. *United States,* 303 U. S. 642. However, the statute in terms, and appropriately so, is limited in its application to the "trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors." It has no application in purely civil proceedings. See *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 153–154; *United States* v. *Lee Huen,* 118 Fed. 442, 456 (N. D. N. Y.). The instant proceeding was not a criminal proceeding within any of the categories set forth in the statute, nor was it a proceeding against petitioner as a person "charged with the commission of a crime." The proceeding was *in rem* against certain property forfeited because it was intended to be used in the commission of a crime and not in consequence of the actual commission of an offense. No actual commission of a crime was necessary to support the libel, nor so far as

this libel is concerned, was any offense by petitioner established.[7] Cf. *Lilienthal's Tobacco* v. *United States,* 97 U. S. 237, 267, where a comparable statute was involved.

For similar reasons, it cannot be said that the trial judge's remarks violated the privilege of the Fifth Amendment against self-incrimination. The object of that provision is to secure a person against criminal prosecution which might be aided directly or indirectly by his disclosure. *Brown* v. *Walker,* 161 U. S. 591. Where the facts do not constitute a federal offense, or where prosecution is barred, as by the statute of limitations, amnesty, immunity or pardon, the privilege cannot be invoked. *Brown* v. *Walker, supra;*

[7] In his brief in support of his petition for rehearing below, petitioner asserted (p. 11), though he does not reiterate the point here, that possessing property intended to be used in violation of the internal revenue laws is itself criminally punishable under Section 3115 (b) of the Internal Revenue Code (26 U. S. C. 3115 (b)), which provides, in part, that:

"Any person violating the provisions of this part or of any regulations issued thereunder, for which offense a special penalty is not prescribed, shall be liable to the penalty or penalties prescribed in subsection (a). * * *"

However, the foregoing provision relates only to violations of "this part" of the Internal Revenue Code, i. e., Chapter 26, Subchapter C, Part II, relating to industrial alcohol. The provisions of Section 3116 relate to possession of property intended for use in violating "this part" of the Internal Revenue Code or any of the other internal revenue laws. And it was to provisions of such laws other than Chapter 26, Subchapter C, Part II, and not concerning industrial alcohol, that the intended offenses were related by the terms of the libel. Obviously, therefore, Section 3115 (b) is inapplicable.

Robertson v. *Baldwin,* 165 U. S. 275, 282; *United States* v. *Murdock,* 284 U. S. 141, 149; *Moore* v. *Backus,* 78 F. 2d 571, 577 (C. C. A. 7), certiorari denied, 296 U. S. 640; *Graham* v. *United States,* 99 F. 2d 746, 749 (C. C. A. 9); *United States* v. *St. Pierre,* 128 F. 2d 979, 980–981 (C. C. A. 2). Thus, the Fifth Amendment is inapplicable here, since the forfeiture was not in consequence of the commission of any criminal offense, and petitioner was not, by reason only of his intent to violate the internal revenue laws, subject to criminal prosecution. The *Boyd* case, on which petitioner relies, is therefore clearly inapposite. That case was a forfeiture proceeding under a statute providing punishment by imprisonment or fine and by forfeiture in consequence of a completed offense. This Court said that since the forfeiture was provided by reason of an offense for which criminal prosecution could be had, the forfeiture proceedings were quasi-criminal and that, therefore, evidence secured by an illegal search and seizure could not be employed therein because such use would violate the privilege against self-incrimination (116 U. S. at 633–634). Here, however, in contradistinction to the *Boyd* case, the forfeiture is preventive and not in consequence of an offense for which petitioner could be prosecuted. Moreover, petitioner's failure to testify, or the district court's reference to that fact, is not incriminating evi-

dence which could be utilized affirmatively against him in a criminal proceeding.

CONCLUSION

The decision below is correct and there is no conflict of decisions as petitioner urges. For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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